REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***9th April 2022*** Signature: _____

CASE NO: 13430/2022

DATE: 9TH APRIL 2022

In the matter between:

GUMBI, THABI HAZEL Applicant

and

RALSTAN INVESTMENTS (PTY) LIMITED Respondent

Coram: Adams J

Heard: 7 April 2022 – The 'virtual hearing' of the urgent application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 9 April 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 9 April 2022.

Summary: Opposed Urgent application – *mandament van spolie* – the nature of spoliation proceedings demands a speedy remedy – factual disputes decided in terms of *Plascon-Evans* rule – respondent's version untenable and rejected as

far-fetched – remedy based on fundamental principle that no man is allowed to take the law into his own hands – existence of underlying *causa* or the validity or lawfulness thereof irrelevant – *in casu* relief claimed on basis of physical possession and not personal contractual or *quasi-possessio* rights – application for reinstatement granted.

ORDER

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(1) The applicant's urgent application against the respondent succeeds.

(2) Possession and occupation of the business premises situate at Shop number 1, 621 Jules Street, Malvern, Johannesburg ('the premises') shall be restored to the applicant forthwith and immediately by the respondent and its member.

(3) In the event of the respondent failing to comply with the order in paragraph (2) above, the Sheriff of the High Court be and is hereby authorised and directed to restore to the applicant possession and occupation of the premises and to reinstate the applicant in terms of this order.

(4) The respondent shall pay the applicant's costs of this Urgent Application.

JUDGMENT

Adams J:

[1]. The applicant in this opposed urgent application is a practising traditional healer – a *Sangoma*. She applies for an order reinstating her possession and occupation of business premises situate in Malvern, Johannesburg. The applicant occupied these premises and from there she conducted her practice as a traditional healer. The 'tools of her trade' were also kept at the premises, including, importantly, live small animals, such a rabbit and a tortoise, which form an integral part of her practice as a *Sangoma* and her related spiritualism and traditions.

[2]. That was until Monday, 4 April 2022, when, so the applicant alleges, she was unceremoniously locked out of her practice by the respondent, who is the owner of the property on which the premises are situated. The respondent is also her landlord, who has commenced eviction proceedings in this court with a view to have the applicant ejected from the premises. Those eviction proceedings are still pending. The applicant was locked out of the premises by the respondent, who apparently had chained and padlocked the entrance door to the premises, which prevented the applicant from entering her practice on her arrival there on 4 April 2022.

[3]. The applicant occupied the premises pursuant to and in terms of a lease agreement. She is in breach of the said lease agreement in that she is in arrears with payment of her monthly rental and the respondent had obtained a monetary judgment for payment of a portion of the arrear rental. And as already indicated, the respondent has also instituted eviction proceedings against the applicant, who is vigorously opposing those proceedings. This is probably why the respondent, who is understandably frustrated by its recalcitrant and stubborn tenant, just wants her out of the premises and this is probably the real reason why the applicant was locked out of her practice on 4 April 2022.

[4]. It is common cause between the parties that the respondent does not now have and never had a court order authorising the eviction of the applicant from the premises, which is what the lock-out in effect amounted to. Of that there can be little doubt. The respondent bizarrely denies in his answering affidavit that he is the one responsible for locking the applicant's shop. The respondent suggests that the premises may have been padlocked by the applicant herself or by a Ms Ramala, who, according to a Sheriff's Return of Service dated 18 March 2022, is the present occupier of the premises in question. This return by the Sheriff also indicates that the applicant, as per Ms Ramala, had left the given address and her present whereabouts were unknown.

[5]. This return of service forms the basis of the respondent's opposition to the applicant's urgent application. As already indicated, the respondent denies that it spoliated the applicant. But, in any event, so the respondent contends, the

applicant was not in occupation of the premises, so therefore she could not be deprived of occupation if she was not in occupation. All of this is disputed by the applicant.

[6]. The respondent, in addition to disputing the urgency of the application, also raises the legal point that the applicant's cause of action is one for specific performance and not based on the *mandament van spolie*. The issues to be decided in this urgent application is therefore the following: (1) Urgency; (2) The factual disputes between the parties relating to whether the respondent chained and padlocked the main door to the shop and whether the applicant was in occupation of the premises before it was locked; and (3) Whether the applicant is precluded from relying on the *mandament van spolie* in view of her allegation that she is in lawful occupation of the premises pursuant to an oral lease agreement.

[7]. As for urgency, the case of the applicant is that her traditional and spiritual practice, which entails her consulting with and advising her clients, as well as looking after their physical wellbeing, is suffering tremendously. Her clients need her help on a daily basis and they are now being deprived of her support. As regards extreme urgency, the applicant relies mainly on the fact that she is presently unable to feed her animals, which run the risk of starving to death.

[8]. For these reasons, the applicant contends that the matter is urgent. I agree. If the applicant is right that she was spoliated by the respondent, then that amounts to an act of lawlessness. The very nature of spoliation proceedings demands a speedy remedy. I am persuaded that the matter is urgent. It is necessary to prevent members of the public from taking the law into their own hands or to resort to self-help, and to do so expeditiously.

[9]. What the respondent did was to bypass court processes. This is unacceptable and unless the applicant is granted relief on an urgent basis, the respondent will be allowed to engage in impermissible acts of self-help. The right of access to court is the bulwark against vigilantism and the chaos and anarchy which it causes. Therefore, the matter is urgent.

[1]. As for the factual dispute, it is so, as argued by Mr Silver, who appeared on behalf of the respondent, that such disputes are to be decided on the basis of the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*[1].

[2]. It will be recalled that the main factual dispute between the parties is whether or not the respondent chained and padlocked the security door to the shop. When a demand was first addressed to the respondent, they responded that the premises were locked because the applicant had left. No mention was made at that stage by the applicant of their supposed ignorance as to who locked the shop. It was only in their answering papers in this urgent application that they, for the first time, indicated that they do not know who locked the premises. The respondent, relying on the sheriff's return, also contends that the applicant left the premises, which the applicant vehemently denies.

[3]. The applicants submit that the version of the respondent is untenable and that it can and should be rejected on the papers as far-fetched. If regard is had to the evidence before me as a whole, the version of the applicant has a ring of truth to it. Importantly, when contrasted against the applicant's version, which is a simple straightforward one, the respondent's version indeed sounds far-fetched, in addition to being based on evidence, which may be explained in a number of other ways. The question is simply this: why would the applicant go to the trouble of this urgent application if she had not been spoliated? Moreover, if, as it claims, the respondent was not the one who locked the premises, why did it, as the owner of the property, not simply say to the applicant: 'go ahead and break the lock. We don't know who locked you out'? Instead, it vigorously opposes the spoliation application, which goes to show, in my view, that the respondent knows full well that it violated the applicant's possessory rights.

[4]. Therefore, I agree – the version of the respondent is far-fetched and stands to be rejected on the papers. I therefore conclude that the respondent is the one who locked the applicant out of her shop.

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*, 1984 (3) SA 623 (A).

[5]. It may be apposite at this juncture to say something about the general principles applicable to the legal remedy of *mandament van spolie*, which has been part of our law for generations. Its scope and application has been aptly summarised in the old Transvaal Full Bench decision of *Nino Bonino v De Lange*[2]. Innes CJ had this to say:

'It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the court will summarily restore the *status quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear'

[6]. It is trite that if one takes the law into your own hands by dispossessing another, the *status quo ante* will be restored summarily and you will be ordered to restore possession to the previous possessor. *Mandament van Spolie* is not an order for specific performance – the one is a summary remedy based on free and undisturbed possession of a 'thing' and the other is a remedy based in contract.

[7]. So, the question is whether the respondent spoliated the applicant. Or, put another way, was the respondent justified in 'taking the law into his own hands' by locking the applicant out of the shop without a court order? On first principles, the answer to the first question is yes and the answer to the second question is no.

[8]. Mr Silver, however, submitted that the applicant in her application made reference to the underlying *causa* for her occupation and possession of the premises, that being an oral lease agreement. Once she did that, so I understand Mr Silver's submission, she then attracts an onus to allege and prove the validity and lawfulness of the lease, failing which she is not entitled to a spoliation order as this would amount to the Court ordering specific performance in circumstances in which the applicant, who by all accounts is in breach on the lease, which, in any event was lawfully cancelled, according to the respondent. Moreover, an

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[2] *Nino Bonino v De Lange*, 1906 TS;

applicant cannot be allowed, under the guise of the *mandament van spolie*, to apply for specific performance in terms of a contract – that much is trite.

[9]. For his submissions in that regard, Mr Silver relies on the following case law: *Eskom Holdings SOC Ltd v Masinda*[3]; *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*[4]; and *Xolitshe Trading Enterprise (Pty) Ltd v Blairvest CC*[5]. I was specifically referred to paras [13] and [14] of the *FirstRand Limited* judgment, in which it was held as follows:

'[13] The *mandament van spolie* does not have a "catch-all function" to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the *mandament* is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of *quasi-possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its *quasi-possessio* is deserving of protection by the mandament. Kleyn H seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandament. The right held in *quasi-possessio* must be a 'gebruiksreg' or an incident of the possession or control of the property.

[14] This is illustrated by *Telkom SA Ltd v Xsinet (Pty) Ltd*, a case that concerned Telkom's supply of a telephone and bandwidth system to Xsinet to enable the latter to conduct its business as an internet service provider. Telkom alleged that Xsinet was indebted to it in respect of one of the other services provided by it and disconnected Xsinet's telephone and bandwidth system. There was no suggestion that Telkom had interfered with Xsinet's physical possession of its equipment nor that it had entered onto the premises of Xsinet to do so. Jones AJA did not accept that the use of the bandwidth and telephone services constituted an incident of the possession of the property as the use of water and electricity may in certain circumstances be even though these services were used on the premises. There was no interference with Xsinet's physical possession

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[3] *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA).

[4] *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA) ([2007] 1 All SA 436);

[5] *Xolitshe Trading Enterprise (Pty) Ltd v Blairvest CC* 2021 JDR 2282 (GP);

of the equipment and there was no evidence that it was ever in possession of any of the mechanisms by which the equipment was connected to the internet. He remarked that it would be both artificial and illogical to conclude that the use of the telephone, lines, modems or electrical impulses gave Xsinet possession of the connection of its corporeal property to Telkom's system. He rejected counsel's contention that the *quasi-possessio* of the right to receive Telkom's services could be restored by the mandement. This right, he said, is a mere personal right and the order sought is essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This has never been allowed under the *mandament van spolie* and there is no authority for such an extension of the remedy.'

[10]. To say that the reliance by Mr Silver on these cases in support of his contentions is misguided, is an understatement. These cases all deal with personal contractual and *quasi-possessio* rights. These cases are certainly not authority for the proposition, as submitted on behalf of the respondent, that if there is a dispute relating to the contract underlying an applicant's right to possession of property, an applicant is not entitled to have his possession restored after he had been spoliated. This submission, in my view, would require of the Court to abandon and jettison principles relating to the *mandament van spolie,* which have been in place for centuries.

[11]. The simple fact of the matter is that the applicant was in free and undisturbed possession of the business premises until shortly before Monday, 4 April 2022. On that day the respondent and its member or members dispossessed the applicant by locking her out of the premises and by denying her access thereto. This the respondent and its member did without a court order. The aforegoing entitles the applicant to a *mandament van spolie*.

[12]. Accordingly, the applicant's urgent application against the respondent should succeed and her possession and occupation of the premises should be restored.

Costs

[13]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[14]. I can think of no reason why this general rule should be deviated from in this matter. I therefore intend granting costs in favour of the applicant against the respondent.

Order

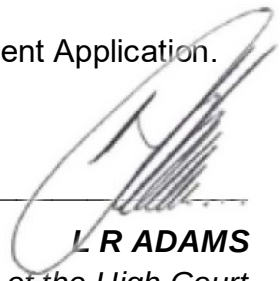
[15]. Accordingly, I make the following order: -

(1) The applicant's urgent application against the respondent succeeds.

(2) Possession and occupation of the business premises situate at Shop number 1, 621 Jules Street, Malvern, Johannesburg ('the premises') shall be restored to the applicant forthwith and immediately by the respondent and its member.

(3) In the event of the respondent failing to comply with the order in paragraph (2) above, the Sheriff of the High Court be and is hereby authorised and directed to restore to the applicant possession and occupation of the premises and to reinstate the applicant in terms of this order.

(4) The respondent shall pay the applicant's costs of this Urgent Application.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	7th April 2022 – in a 'virtual hearing' during a videoconference on *Microsoft Teams*
JUDGMENT DATE:	9th April 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Nomvula Nhlapo
INSTRUCTED BY:	Sithi & Thabela Attorneys, Johannesburg
FOR THE RESPONDENT:	Advocate M D Silver
INSTRUCTED BY:	David Kotzen Attorneys, Germiston